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No. **346**

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CHARLES ELMORE DREPMER
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IN THE
Supreme Court of the United States
OCTOBER TERM 1943

WASHINGTON BREWERS INSTITUTE, a corporation, *et al.*,
Petitioner (Appellant below),
vs.

UNITED STATES OF AMERICA,
Respondent (Appellee below).

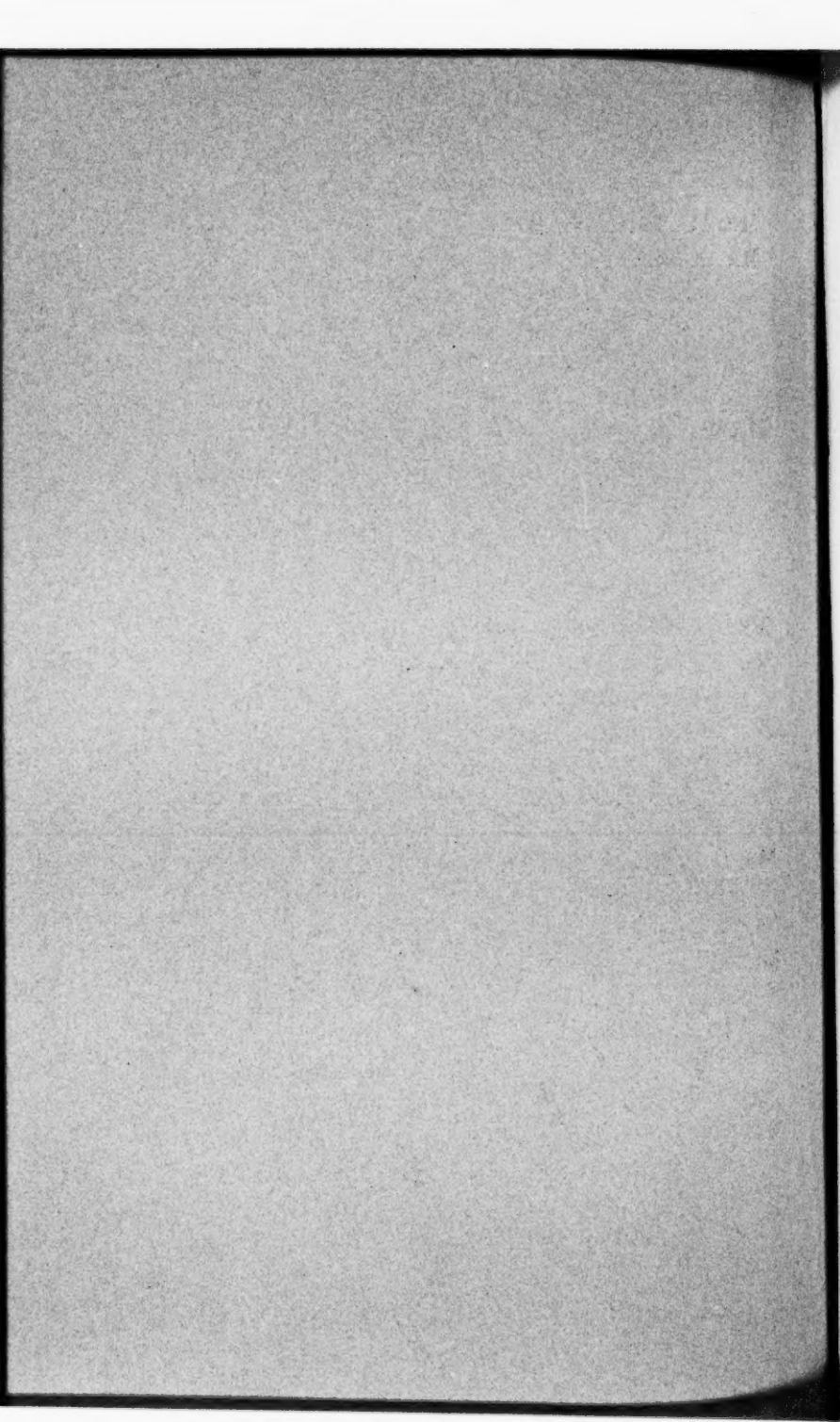
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT AND
BRIEF IN SUPPORT OF PETITION

WASHINGTON BREWERS INSTITUTE, *et al.*,
Petitioners,

By R. M. J. ARMSTRONG
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CASSIUS E. GATES
GREGORY A. HARRISON
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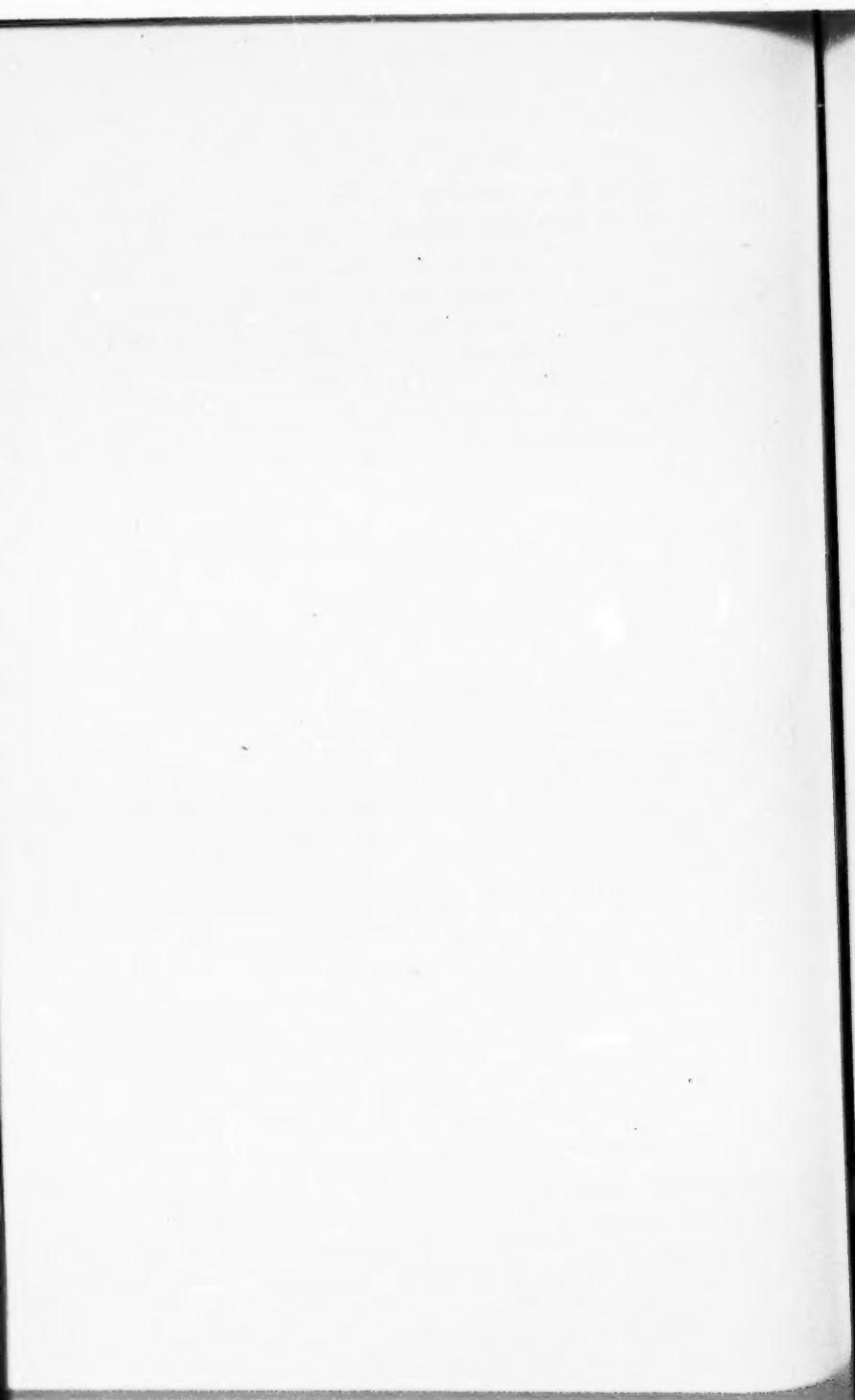
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED
STATES:

Washington Brewers Institute, Henry T. Ivers, H. J. Durand, Olympia Brewing Company, Peter G. Schmidt, Adolph D. Schmidt, Columbia Breweries, Inc., East Idaho Brewing Co., Inc., Joseph F. Lanser, Harry P. Lawton, E. Louis Powell, California State Brewers Institute, James G. Hamilton, Seattle Brewing & Malting Co., The Spokane Brewery, Inc., William H. Mackie, Rene Besse, Emil G. Sick, George W. Allen, Pioneer Brewing Co., Russell G. Hall, Bohemian Breweries, Inc., Edwin F. Theis, Idaho Brewers Institute, Steve T. Collins, Overland Beverage Co., Becker Products Co., Gus L. Becker, C. C. Wilcox, The Brewers Institute of Oregon, George F. Paulsen, Interstate Brewing Co., G. V. Uhr, Pacific Brewing & Malting Co., James E. Knapp, Regal Amber Brewing Co., Acme Breweries, Karl F. Schuster and William

P. Baker, jointly petition and each severally petitions that a writ of *certiorari* issue to review a judgment entered on the 13th day of August, 1943, by the United States Circuit Court of Appeals for the Ninth Circuit in a cause pending in that court entitled, "*Washington Brewers Institute, et al., Appellants, v. United States of America, Appellee, No. 10303*," (R. 185 reported in 136 F.(2d) p., Advance Sheets).

A. Summary Statement of the Matter Involved

A Grand Jury within and for the Northern Division of the Western District of Washington, on May 5, 1941, returned an indictment charging the petitioners and others in two counts with violations of Secs. 1 and 3 of the Act of Congress approved July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," (26 Stat. 209), commonly known as the Sherman Act (R. 6).

Petitioners were duly and regularly arraigned and granted the opportunity of filing motions and demurrers directed to the indictment. Demurrers were filed by all petitioners (R. 38, 133, 135) and argued. The demurrers were overruled by the District Court (R. 52).

Petitioners entered pleas of *nolo contendere* and judgment and sentence was imposed by the court (R. 56-133 Inc.).

Petitioners appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the overruling of the demurrers by the District Court (R. 140-165).

The Circuit Court of Appeals for the Ninth Circuit

affirmed the action of the lower court (R. 185). This decision of the Circuit Court of Appeals your petitioners earnestly seek to review here.

Questions Presented

Such review presents the following questions:

(1) Since the adoption of the Twenty-first Amendment to the Federal Constitution has the Federal Government any jurisdiction over commerce among the several states or with the territories, in intoxicating liquor, other than to enforce the Twenty-first Amendment?

(2) Does the Twenty-first Amendment with respect to the regulation of the liquor traffic free the states from previous constitutional restraint (the Commerce Clause), and if so, are not the states restored to the status which they enjoyed prior to the adoption of the Constitution and the Commerce Clause thereof, and thus possessed of exclusive jurisdiction over commerce in this commodity?

(3) Since the adoption of the Twenty-first Amendment, has the Federal Government any authority to legislate in the field of regulating commerce in intoxicating liquor with respect of any state or territory which has occupied the field by appropriate legislative action?

(4) In view of the Twenty-first Amendment, if a state law has made a particular act illegal with respect to commerce in intoxicating liquor, can such act be charged as a violation of a Federal statute dealing with the same subject?

(5) Is an indictment under the Sherman Act, in-

volving intoxicating liquor, sufficient, which ignores and excludes the factor of State legislation?

(6) Will the law presume, in order to sustain Federal jurisdiction and the existence of a crime, that the acts charged have not been "commanded or implicitly encouraged" by State law?

If the answer to any of the questions 1 to 4 inclusive is in the affirmative, or to questions 5 and 6 is in the negative, the action of the District Court in overruling the demurrers and the affirmance thereof by the Circuit Court of Appeals was in error.

B. Reasons Relied on for Allowance of the Writ

(1) Questions are presented herein which have not been heretofore specifically determined by the Supreme Court of the United States. Since the adoption of the Twenty-first Amendment many of the states have enacted legislation for the control of the liquor traffic based on theories diametrically opposed to the theory of the Sherman Anti-Trust Act. These state laws have for their purpose the restriction and restraint of competition in the traffic in intoxicating liquor. The conflict existing between such state and Federal legislation has not been the subject of any decision of this court, nor has the delineation of the respective authority of the Federal and State governments with respect thereto been determined. Certain decisions of this court which will be hereinafter appropriately cited have dealt with the affirmative authority of the state to adopt legislation which prior to the Twenty-first Amendment would have been unconstitutional under the Commerce, Due Process and

Equal Protection Clauses. But the precise question here involved has not been directly raised or determined in any of those decisions.

(2) There exists a conflict between certain of the Circuit and District Courts, and confusion, with respect to the effect of the Twenty-first Amendment insofar as the power and authority of the State and Federal Governments are concerned.

Zukaitis v. Fitzgerald, 18 F. Supp. 1000;

Wylie v. State Board, 21 F. Supp. 604;

Joseph S. Finch & Co. v. McKittrick, 23 F. Supp. 244;

U. S. v. Colorado Wholesale, etc., Ass'n., 47 F. Supp. 160;

Arrow Distilleries, Inc. v. Alexander, 109 F.(2d) 397;

Flippen v. U. S., 121 F.(2d) 742;

Schlitz Brewing Co. v. Johnson, 123 F.(2d) 1016.

The differences which existed prior to *State Board of Equalization v. Young's Market*, 299 U.S. 59, as noted at page 60 have not been fully settled.

(3) It is a matter of national concern both to persons engaged in commerce in intoxicating liquor and to the governments of the several states to know to what extent any remaining authority in the Federal Government limits, affects or compliments the authority and sovereignty of the states in regulating commerce in intoxicating liquor. Unless and until this court determines that question, particularly with respect to the conflict which must obviously exist between state laws having as their purpose the limita-

tion or suppression of competition in the traffic in intoxicating liquor and the Sherman Anti-Trust Act, continued uncertainty will be produced.

Persons engaged in this commerce are placed in a position of double jeopardy where such a fundamental conflict exists, and this court ought to determine with certainty, by the policies of which sovereignty such persons must be guided.

C. Prayer

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the cause numbered and entitled in its docket, "No. 10303, *Washington Brewers Institute, et al., Appellants, v. United States of America, Appellee*;" and that the said decree of the said United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

WASHINGTON BREWERS INSTITUTE, *et al.*,
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